

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 8470 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

JYOTIBEN VINODBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 8470 of 2001
MR SHAKEEL A QURESHI for Petitioner No. 1
MR IM PANDYA APP for Respondent No. 1
-

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 22/01/2002

ORAL JUDGEMENT

The present petition has been filed by the
petitioner for regular bail in connection with the
offence registered against the petitioner before the

Rajkot Taluka Police Station vide CR No.74 of 1999 on the ground of Sec.167(2) of the Code of Criminal Procedure Code, in which notice has been issued by this Court vide order dtd.25/10/2001.

2. Heard the learned counsel Mr.Shakeel A. Qureshi for the petitioner and learned APP Mr.PR Abichandani for the respondent State.

3. Rule. Learned APP Mr.IM Pandya waives the service of rule.

4. The learned counsel for the petitioner has submitted that the present petitioner lady - original accused has been arrested on 8/7/1999 in connection with the aforesaid offence registered against the petitioner under the provisions of the Narcotic Drugs & Psychotropic Substance Act for which admittedly the investigating agency has filed chargesheet on 1/11/1999. He has submitted that that the petitioner is required to be released on bail on the basis of provisions contained under Sec.167 of the Code of Criminal Procedure.

5. The learned counsel for the petitioner has further submitted that in the present case the investigating agency is bound to file the chargesheet within 90 days from the date of filing of the FIR against the petitioner, but here in the present case, the police agency has not filed chargesheet within the time prescribed under the Code of Criminal Procedure. And therefore, the petitioner preferred an application for regular bail under Sec.167(2) of the Code of Criminal Procedure Code before the Sessions Court on 29/10/1999 and during the pendency of the said default bail application, the investigating agency filed chargesheet on 1/11/1999, and the learned Sessions Court rejected the bail application of the petitioner for default bail on 2/11/1999. Thereafter, the petitioner again filed an application before the trial court on 15/6/2001 for releasing the petitioner for default bail under Sec.167 of the Code of Criminal Procedure Code, which came to be rejected by the trial court vide order dtd.7/9/2001 against which the petitioner preferred this application for regular bail under Sec.167(2) of the Code of Criminal Procedure Code before this Court on 23/10/2001 and this Court has issued notice vide order dtd.25/10/2001.

6. The learned counsel for the petitioner has further submitted that the petitioner was pregnant after January, 2001 and therefore, she could not prefer bail application on the ground of Sec.167(2) of the Code of

Criminal Procedure earlier, but the learned Sessions Court has granted temporary bail for 2-3 times and this Court also granted temporary bail for 2 times on the ground of her pregnancy. Under the circumstances, she has filed this application for regular bail on the ground of default of bail and delay in trial under Sec.167(2) of the Code of Criminal Procedure.

7. The learned counsel for the petitioner has submitted that the petitioner is innocent and falsely implicated in the offence. He has further submitted that she is having five children out of which two are with her in jail and three are with his husband. He has further submitted that there is nobody to look-after her children as her husband has to go out of station for job frequently. Lastly, he has restricted his argument only on the point of not filing chargesheet by the investigating agency within stipulated time.

8. The learned counsel for the petitioner has taken me through Sec.167(2) of the Code of Criminal Procedure which reads as under :-

Sec.167(2):-

- (a) the Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction ;

Provided that ;

- (a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding;-

- (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than

ten years;

- (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII of the purposes of that chapter;

9. The learned counsel for the petitioner has relied upon and drawn my attention to the decision rendered by the Supreme Court in the case of UNION OF INDIA VS. THAMISHARASI AND OTHER, reported in (1995) 4 S.C.C. 190 which is also followed by the Supreme Court in the judgement reported in 2001(2) GLH 493. In the said judgement Hon'ble Supreme Court in para 10, 11 and 12 has held as under :-

10. The limitations on granting of bail specified in clause (b) of sub-section (1) of Section 37 comes in only when the question of granting bail arises on merits. By its very nature the provision is not attracted when the grant of bail is automatic on account of the default in filing the complaint within the maximum period of custody permitted during investigation by virtue of sub-section (2) of Sec.167 Cr.PC. The only fact material to attract the proviso to sub-section (2) of Section 167 is the default in filing the complaint within the maximum period specified therein to permit custody during investigation and not the merits of the case when till the filing of the complaint are not before the court to determine the existence of reasonable ground for forming the belief about the guilt of the accused. The learned Additional Solicitor General submitted that this belief can be formed during investigation by reference to the contents of the case diary even before the chargesheet has been filed. This is fallacious. Till the complaint is filed the accused is supplied no material from which he can discharge the burden placed on him by Sec.37(1)(b) of the NDPS Act. In our opinion,

such a construction of clause (b) of sub-section(1) of Sec.37 is not applicable.

11. Sub-section (3) of Sec.36-A provides that the special powers of the High Court regarding bail application Section 439 of the code of Criminal Procedure shall not be affected by anything contained in Section 439 of the Code of Criminal Procedure shall not be affected by anything contained in Section 36-A of the NDPS Act. Sub-section (2) of Sec.167 CrPC has been expressly applied by Section 36-A of the Act and the scheme of the Act is that the provisions of the Code would apply except where there is any inconsistent provision in this Act in relation to arrests made under this Act. It is this context in which Section 37(1)(b) has to be construed wherein are specified the limitation on granting of bail. We must, therefore, look to the corresponding provisions in the Code of Criminal Procedure with which Section 37(1)(b) of the Act can be treated to be inconsistent. In the Code of Criminal Procedure, it is Section 437 and not Section 167 which is the corresponding provision for this purpose. The corresponding limitation on grant of bail in case of non-bailable offence under Section 437 is as follows ;

"(i) such person shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;"

In other words, under Section 437 of the Code the person is not to be released on bail "if there appear reasonable grounds for believing that he has been guilty of an offence..." while accordance to Section 37 of the NDPS Act, the accused shall not be released on bail unless "the court is satisfied that there are reasonable ground for believing that he is not guilty of such offence..." The requirement of reasonable grounds for belief in the guilt of the accused to refuse bail is more stringent and, therefore, more beneficial to the accused than the requirement of reasonable grounds for the belief that he is not guilty of the offence under Section 37 of the NDPS Act. Under Section 437 CrPC the burden is on the prosecution to show the existence of reasonable grounds for the belief that he is not guilty of the offence. In the

first case, the presumption of innocence in favour of the accused is displayed only on the prosecution showing the existence of reasonable grounds to belief that the accused is guilty while under the NDPS Act it is the accused who has to show that there are reasonable grounds for believing that he is not guilty.

12. The limitation on the power to release on bail in Sec.437 Cr.PC is in the nature of a restriction on that power, if reasonable grounds exist for the belief that the accused is guilty. On the other hand, the limitation on this power in Section 37 of the NDPS Act is in the nature of a condition precedent for the exercise of that power, so that, the accused shall not be released on bail unless the court is satisfied that there are reasonable grounds to belief that he is not guilty. Under Section 437 CrPC it is for the prosecution to show the existence of reasonable grounds to support the belief in the guilt of the accused to attract the restriction on the power to grant bail; but under Section 37 NDPS Act it is the accused who must show the existence of grounds for the belief that he is not guilty, to satisfy the condition precedent and lift the embargo on the power to grant bail. This appears to be the distinction between the two provisions which makes Section 37 of the NDPS Act more stringent."

10. The learned counsel for the petitioner has further relief upon the decision relied upon and drawn my attention to the decision rendered by the Hon'ble Supreme Court rendered in the case of MAJOJ Vs. State of M.P. reported in the case of 1999 SCC (Cri.) 478 in which the Hon'ble Supreme Court in para 7 has held as under :-

7. It is now well-nigh settled that benefit of the proviso to Section 167(2) of the Code would endue to an accused involved in the offences under the NDPS Act as well, (vide Union of India v. Thamisharasi). Para 14 of the said decision reads thus; (SCC pp.198-99)

"14. In our opinion, in order to exclude the application for the proviso to indicating the contrary intention was required or at least some provision from which such a conclusion emerged by

necessary implication. As shown by us, there is no such provision in the NDPS Act and the scheme of the Act indicates that the total period of custody of the accused permissible during investigation is to be found in Section 167 CrPC which is expressly applied. The absence of any provision inconsistent herewith in this Act is significant."

The learned counsel for the petitioner has further submitted that the aforesaid judgement of the Supreme Court i.e. 1995(4) SCC 190 is followed in 1999 SCC (Cri.) 479; and therefore, Sec.167(2) of the Code of Criminal Procedure is also applicable to the offence registered under the NDPS Act.

11. The learned counsel for the petitioner has relied upon and drawn my attention to the decisions rendered by the Supreme Court in the case of UDAY MOHANLAL ACHARYA VS. STATE OF MAHARASHTRA, reported in 2001(2) GLH 493. The Head-note "A" of the said judgement is as under :-

- (A) Code of Criminal Procedure, 1973 - Ss.57 and 167
- Accused is entitled to demand that justice is not delayed - Provision authorities Magistrate permitting the detention of accused in custody and prescribing maximum period of detention. A beneficial provision to cure indefinite prolonged investigation - On expiry of period the accused has to be released on bail Without order of Magistrate, legislative mandate cannot be given effect.

In para 9 of the aforesaid judgement, the Hon'ble Supreme Court has held as under :-

9. In Dr.Bipin Shantilal Panchal Vs. State of Gujarat [JT 1996 (1) SC 116 = (1996) 1 SCC 718], a Three Judge Bench decision, this court referred to the proviso to sub-section (2) of sec.167 of the Code of Criminal Procedure and held that though the aforesaid provisions would apply to an accused under NDPS Act but since chargesheet had already been filed and the accused is in custody on the basis of orders of remand passed under other provisions of the Code.

In the aforesaid judgement, in para 12 the

Hon'ble Supreme Court has held as under :-

...On the aforesaid premises, we would record our conclusions as follows ;

- [1] Under sub-section 2 of sec.167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorise detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days in the whole.
- [2] Under the proviso to aforesaid sub-section 2 of section 167, the Magistrate may authorise detention of the accused otherwise than the custody of police for a total period not exceeding 90 days where investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.
- [3] On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnish the bail, as directed by the Magistrate.
- [4] When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency on completion of the investigation within the specified period, the Magistrate / Court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no chargesheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate / Court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.

[5] If the accused is unable to furnish the bail, as directed by the Magistrate, then the conjoin reading of Explanation-I and proviso to sub-sec.2 of sec.167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorised, and therefore, if during that period, the investigation is completed and chargesheet is filed, then the so-called indefeasible right of the accused would stand extinguished.

[6] The expression "if not already availed of" used by this Court in Sanjay Dutt's Case (Supra) must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of proviso to sub-sec.2 of sec.167 if the accused files an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same.

With the aforesaid interpretation of the expression "availed of if chargesheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished necessarily therefore, if an accused is entitled to be released on bail by application of the proviso to sub-section 2 of sec.167, makes the application before the Magistrate but the Magistrate erroneously refuses the same and rejects the application and then the accused moves the higher forum and while the matter remains pending before the higher forum for consideration of a chargesheet is filed, the so-called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a chargesheet being filed in accordance with Sec.209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail, and subject to the provisions of

cancellation of bail, already granted in accordance with law laid down by this Court in the case of Mohd.Iqbal vs. State of Maharashtra (Supra)."

12. The learned counsel for the petitioner has further relied upon the decision of this Court rendered by this Court (Coram : A.L. Dave, J.) in Criminal Misc.Application No.6353 of 2001 dt.30/10/2001 in connection with the offence registered against the petitioner of the said petition under the provisions of NDPS Act, in which also benefit of Sec.167(2) of the Code of Criminal Procedure has been given under default bail and in para 2 of the said decision, this Court has held as under ;

2. Undisputedly, the applicant has availed of his right of being released on bail on account of default on the part of the investigating agency in filing the chargesheet within time limit specified under section 167 of Cr.P.C. Under the circumstances, this application deserves to be allowed without entering into the merits."

13. In view of the above referred judgements and facts and circumstances of the case, I accept the arguments of the learned counsel for the petitioner that provisions of Sec.167(2) of the Code of Criminal Procedure are also applicable to the offence registered under the NDPS Act and hence, I pass the following order;

[1] Considering the submissions made on behalf of the parties, and having regard to the facts and circumstances of the case, the petition is allowed and the petitioner is ordered to be released on bail in connection with the Crime Register No.74 of 1999 of Rajkot Taluka Police Station on her executing a bond of Rs.20,000/- (Rupees Twenty Thousand only) with one surety of the like amount to the satisfaction of the lower Court and subject to the conditions that she shall,

[a] not to take undue advantage of her liberty or abuse her liberty.

[b] not act in a manner injurious to the interest of prosecution;

[c] maintain law and order;

[d] mark her presence for a period of six months before the Registrar of Sessions Court, Rajkot once in a month more particularly between 1st to 10th of every month.

[e] not to leave the local limits of Rajkot District without prior permission of the Sessions Judge, Rajkot.

[f] furnish the address of her residence at the time of execution of the bond and shall not change the residence without prior permission of this Court;

[g] surrender her Passport, if any, to the lower court within a week;

[2] If breach of any of the above conditions is committed, the concerned Sessions Court will be free to issue warrant or take appropriate action in the matter.

[3] Bail before the lower court having jurisdiction to try the case.

[4] Rule is made absolute. Direct service is permitted.

(R.P. DHOLAKIA, J.)

Rafik